

## Message Text

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ORIGIN OES-09

INFO OCT-01 NEA-10 ISO-00 SS-15 NRC-07 L-03 ACDA-12  
CIAE-00 INR-10 IO-14 NSAE-00 NSC-05 EB-08 SOE-02  
DODE-00 DOE-15 SP-02 CEQ-01 /114 R

DRAFTED BY OES/NET/NEP:MGUHHIN:JW  
APPROVED BY OES/NET/NEP:MGUHHIN  
NEA/INS: JGRAHAM  
T/D:DWELCH  
NRC:CSTOIBER (INFO)  
NRC:GOPLINGER (INFO)  
L/N:RSLOAN

-----005969 140152Z /75

R 132041Z JUL 78  
FM SECSTATE WASHDC  
TO AMEMBASSY NEW DELHI  
AMCONSUL BOMBAY

UNCLAS STATE 177173

E.O. 11652:N/A

TAGS: MNUC, TECH, ENRG

SUBJECT: COURT DECISION ON APPEAL OF NUCLEAR REGULATORY  
COMMISSION'S OPINION ON TARAPUR INTERVENTION

1. YOU WILL RECALL THAT (A) IN RESPONSE TO A 1976 PETITION  
BY THE NATURAL RESOURCES DEFENSE COUNCIL (NRDC) AND UNION  
OF CONCERNED SCIENTISTS (UCS) TO INTERVENE AGAINST NUCLEAR  
EXPORTS TO INDIA, THE NRC ISSUED AN OPINION ON MAY 7,  
1976, WHICH, AMONG OTHER THINGS, STATED THAT PETITIONERS  
WERE NOT ENTITLED TO A HEARING AS A MATTER RIGHT UNDER THE  
ATOMIC ENERGY ACT BUT THAT THE COMMISSION, AT ITS DIS-  
CRETION, WOULD CONDUCT A LEGISLATIVE-TYPE HEARING ON CON-  
TINUED NUCLEAR SUPPLY TO INDIA (THAT HEARING WAS HELD ON  
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JULY 20-21, 1976); AND (B) THE NRDC AND UCS SOUGHT JUDICIAL  
REVIEW OF THIS OPINION ARGUING THAT THEY HAD A RIGHT TO A  
HEARING AND SHOULD HAVE BEEN ACCORDED AN ADJUDICATORY OR  
TRIAL-TYPE HEARING.

2. ON JULY 3, 1978, THE UNITED STATES COURT OF APPEALS FOR  
THE DISTRICT OF COLUMBIA CIRCUIT ENTERED ITS JUDGMENT IN

THIS MATTER. IN BRIEF, THE COURT DECIDED THAT THE RECENTLY ENACTED NUCLEAR NON-PROLIFERATION ACT MADE CLEAR THAT THE NRC NEED NOT AFFORD ANY PERSON AN ADJUDICATORY HEARING

IN A NUCLEAR EXPORT LICENSE PROCEEDING. THE COURT DID NOT REACH THE ISSUE OF WHETHER PETITIONERS HAD A LEGAL RIGHT TO A HEARING BECAUSE IT WAS UNNECESSARY TO ITS DECISION IN VIEW OF THE FACT THAT PETITIONERS HAD ALREADY BEEN GRANTED A LEGISLATIVE-TYPE HEARING. TEXT OF COURT OPINION FOLLOWS:

PER CURIAM: PETITIONERS CHALLENGE A RULING OF THE NUCLEAR REGULATORY COMMISSION ("NRC"), WHICH (1) DENIED PETITIONERS' REQUEST FOR INTERVENTION IN A NUCLEAR EXPORT LICENSE PROCEEDING FOR LACK OF AN INTEREST AFFECTED BY THE PROCEEDING SUFFICIENT TO AFFORD STANDING, AND (2) CONCLUDED THAT EVEN IF PETITIONERS WERE ENTITLED TO INTERVENE, THEY WERE NOT ENTITLED TO AN ADJUDICATORY HEARING. EDLOW INTERNATIONAL CO., 3 N.R.C. 563 (1976). PETITIONERS CONTEND, IN ESSENCE, THAT EVEN THOUGH THEY WERE AFFORDED A LEGISLATIVE-TYPE HEARING BY THE NRC, THEY ARE ENTITLED TO AN ADJUDICATORY HEARING ON THE NUCLEAR EXPORT LICENSE APPLICATIONS IN QUESTION.

WHILE THIS CASE WAS UNDER SUBMISSION, CONGRESS ENACTED AND THE PRESIDENT SIGNED THE NUCLEAR NON-PROLIFERATION ACT  
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OF 1978, PUB. L. NO. 95-242, 92 STAT. 120 (MAR. 10, 1978).  
SECTIONS 304(B) AND (C) OF THE ACT PROVIDE:

(B) WITHIN ONE HUNDRED AND TWENTY DAYS OF THE DATE OF ENACTMENT OF THIS ACT, THE COMMISSION SHALL, AFTER CONSULTATIONS WITH THE SECRETARY OF STATE, PROMULGATE REGULATIONS ESTABLISHING PROCEDURES (1) FOR THE GRANTING, SUSPENDING, REVOKING, OR AMENDING OF ANY NUCLEAR EXPORT LICENSE OR EXEMPTION PURSUANT TO ITS STATUTORY AUTHORITY; (2) FOR PUBLIC PARTICIPATION IN NUCLEAR EXPORT LICENSING PROCEEDINGS WHEN THE COMMISSION FINDS THAT SUCH PARTICIPATION WILL BE IN THE PUBLIC INTEREST AND WILL ASSIST THE COMMISSION IN MAKING THE STATUTORY DETERMINATIONS REQUIRED BY THE 1954 ACT, INCLUDING SUCH PUBLIC HEARINGS AND ACCESS TO INFORMATION AS THE COMMISSION DEEMS APPROPRIATE: PROVIDED, THAT JUDICIAL REVIEW AS TO ANY SUCH FINDING SHALL BE LIMITED TO THE DETERMINATION OF WHETHER SUCH FINDING WAS ARBITRARY AND CAPRICIOUS; ...PROVIDED FURTHER, THAT UNTIL THE REGULATIONS REQUIRED BY THIS SUBSECTION HAVE BEEN PROMULGATED, THE COMMISSION SHALL IMPLEMENT THE

PROVISIONS OF THIS ACT UNDER TEMPORARY PROCEDURES  
ESTABLISHED BY THE COMMISSION.

(C) THE PROCEDURES TO BE ESTABLISHED PURSUANT TO  
SUBSECTION (B) SHALL CONSTITUTE THE EXCLUSIVE BASIS

FOR HEARINGS IN NUCLEAR EXPORT LICENSING PROCEEDINGS  
BEFORE THE COMMISSION AND, NOTWITHSTANDING SECTION  
189A. OF THE 1954 ACT, SHALL NOT REQUIRE THE COM-  
MISSION TO GRANT ANY PERSON AN ON-THE-RECORD HEARING  
IN SUCH A PROCEEDING.

THIS LAST SUBSECTION, SUPRA, THUS DIRECTS IN UNEQUIVOCAL  
LANGUAGE THAT THE NRC NEED NOT AFFORD ANY PERSON AN  
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ADJUDICATORY HEARING IN A NUCLEAR EXPORT LICENSE PROCEED-  
ING. PETITIONERS' CHALLENGE IN THIS RESPECT IS, THERE-  
FORE, MOOT, SINCE IN THE PRESENT SITUATION WE ARE  
REQUIRED TO APPLY THE LAW IN EFFECT AT THE TIME OF THE  
DECISION. CORT V. ASH, 422 U.S. 66, 76-77 (1975);  
HAMLING V. UNITED STATES, 418 U.S. 87, 102 (1974);  
NLRB V. FOOD STORE EMPLOYEES UNION, 417 U.S. 1, 10 N.10  
(1974); BRADLEY V. RICHMOND SCHOOL BOARD, 416 U.S. 696,  
711 (1974); UNITED STATES V. SCHOONER PEGGY, 5 U.S. (1  
CRANCH) 103, 110 (1801). THERE IS AN EXCEPTION TO THIS  
RULE FOR CASES OF "MANIFEST INJUSTICE." BRADLEY V.  
RICHMOND SCHOOL BOARD, SUPRA, 416 U.S. AT 711. IN THIS  
CASE, TAKING INTO ACCOUNT THE FOREIGN POLICY CONTEXT,  
THE REDUCED ROOM FOR JUSTIFIABLE EXPECTATION OF CHANGED  
CIRCUMSTANCES, AND THE LACK OF PERSONAL ACTION OR PLAN-  
NING IN RELIANCE ON THE OLD RULE, THAT EXCEPTION IS NOT  
APPLICABLE.

SECTION 304(B) OF THE ACT REQUIRES THAT REGULATIONS BE  
PROMULGATED WHICH ESTABLISH PROCEDURES FOR PUBLIC PAR-  
TICIPATION IN SUCH LICENSE PROCEEDINGS. THIS PROVISION  
IS THE ONLY BASIS FOR DETERMINING THE HEARING RIGHTS OF  
GROUPS SUCH AS PETITIONERS AND OTHER INDIVIDUALS OR PER-  
SONS. THE PRECEDENTIAL VALUE OF THE NRC ORDER UNDER RE-  
VIEW INsofar AS IT PERTAINS TO THE RIGHT OF PERSONS TO  
INTERVENE IN HEARINGS IS ELIMINATED, SINCE IT WAS ISSUED  
UNDER THE OLD LAW, AND THE NEW PROCEDURES WILL CONTROL  
FUTURE CASES. ALSO, SINCE THE NRC'S DETERMINATION THAT  
PETITIONERS WERE NOT ENTITLED TO INTERVENE UNDER THE OLD  
STATUTE HAS BEEN MOOTED BY THE ADOPTION OF THE NEW ACT,  
PETITIONERS MAY SEEK TO INTERVENE IN THESE PROCEEDINGS  
UNDER THE NEW STATUTE AND REGULATIONS; AND IF PETITIONERS  
SEEK TO INTERVENE AND THEY CONSIDER THEMSELVES "AGGRIEVED"  
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BY THE FINAL ORDER OF THE COMMISSION ON THEIR REQUEST,  
THEY MAY SEEK JUDICIAL REVIEW ON A NEW RECORD. SEE 28  
U.S.C. 2342(4); 28 U.S.C. 2344; 42 U.S.C. 5841(F);  
42 U.S.C. 5871(G); NUCLEAR NON-PROLIFERATION ACT OF 1978,  
SUPRA, 304(B). WE INDICATE NO OPINION ON THIS ISSUE.

3. EMBASSY MAY WISH TO PASS INFO TO GOI OFFICIALS. CHRISTOPHER

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## Message Attributes

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**Copy:** SINGLE  
**Draft Date:** 13 jul 1978  
**Decaption Date:** 01 jan 1960  
**Decaption Note:**  
**Disposition Action:** n/a  
**Disposition Approved on Date:**  
**Disposition Case Number:** n/a  
**Disposition Comment:**  
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**Disposition Event:**  
**Disposition History:** n/a  
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**Disposition Remarks:**  
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**Enclosure:** n/a  
**Executive Order:** N/A  
**Errors:** N/A  
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**Original Handling Restrictions:** n/a  
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**Page Count:** 4  
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**Previous Handling Restrictions:** n/a  
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**Review Event:**  
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**Review Release Event:** n/a  
**Review Transfer Date:**  
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**Subject:** COURT DECISION ON APPEAL OF NUCLEAR REGULATORY COMMISSION'S OPINION ON TARAPUR INTERVENTION  
**TAGS:** MNUC, TECH, ENRG, IN, NRC  
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**Review Markings:**  
Sheryl P. Walter  
Declassified/Released  
US Department of State  
EO Systematic Review  
20 Mar 2014  
**Markings:** Sheryl P. Walter Declassified/Released US Department of State EO Systematic Review 20 Mar 2014